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CPLR 3126: Action Dismissed with Prejudice Where Preclusion Order Encompasses Entire Claim

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CPLR 3102(d) is reserved for unique situations. Although the court, in its discretion, may order the taking of testimony by deposition after the trial has begun, disclosure ordinarily will not be unavailable to the movant who could have secured the information through normal pretrial proceedings.⁴⁵ Hence, the appellate division was certainly justified in over turning the procedure followed in the lower court.

The framers of the CPLR anticipated that extraordinary situations might exist wherein justice required the reading of a deposition into evidence although a witness was available for the trial.⁴⁶ Nonetheless, the importance of presenting the testimony of an expert witness orally in court must not be underestimated. Slight inconsistencies in treatises or inadequacies in medical records with respect to time of treatment or nature of observations, which can appear so dramatic in the course of the trial, become quite insignificant when a deposition is read in court. Perhaps, the courts should adopt a rule prohibiting the use of depositions of expert witnesses in circumstances such as *Schricker*. An expert who is afraid to appear before a jury, and refuses to do so, should not be permitted to serve as a witness because of the unfairness to the opposing party.

CPLR 3126: Action dismissed with prejudice where preclusion order encompasses entire claim.

CPLR 3126 authorizes the imposition of penalties upon a party⁴⁷ who refuses to disclose information either willfully⁴⁸ or in disobedience of a court order. In addition to the express sanctions, the court is empowered to make "any such orders that are just."⁴⁹ Undoubtedly, however, the most severe penalty that can be levied is one that is specifically enumerated under this section: the rendition of a default judgment against the recalcitrant defendant⁵⁰ or the dismissal with

⁴⁵ 7B MCKINNEY'S CPLR 3102, commentary 8, at 267 (1970); 3 WK&M ¶ 3102.19; see also *Kravetz v. United Artists Corp.*, 141 N.Y.S.2d 676 (Sup. Ct. N.Y. County 1955). But cf. *Nardelli v. Stam*, 13 App. Div. 2d 698, 213 N.Y.S.2d 806 (2d Dep't 1961); *Lopez v. Rich*, 33 Misc. 2d 102, 224 N.Y.S.2d 314 (Sup. Ct. Nassau County 1962).

⁴⁶ 3 WK&M ¶ 3117.08.

⁴⁷ CPLR 3126 pertains to a party or a person under the party's control. Sanctions against a nonparty witness are secured by an application to punish for contempt. 7B MCKINNEY'S CPLR 3126, commentary 3, at 642 (1970).

⁴⁸ If a party has willfully failed to disclose, a 3126 motion lies, without the necessity of first securing an order compelling disclosure. See *Goldner v. Lendor Structures, Inc.*, 29 App. Div. 2d 978, 289 N.Y.S.2d 687 (2d Dep't 1968); *Coffey v. Orbachs, Inc.*, 22 App. Div. 2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964).

⁴⁹ See, e.g., *Cotteral v. City of New Rochelle*, 33 App. Div. 2d 366, 307 N.Y.S.2d 725 (1st Dep't 1969), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 159 (1970).

⁵⁰ See, e.g., *James v. Powell*, 26 App. Div. 2d 525, 270 N.Y.S.2d 789 (1st Dep't 1966), *rev'd on other grounds*, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967).

prejudice of the disobedient plaintiff's cause of action.⁵¹ As demonstrated by *In re Porter*,⁵² though dismissal is rare,⁵³ the court will experience little compunction in so doing when the evasive conduct goes to the essence of a party's claim.

In *Porter* an objectant to proceedings in the surrogate's court was ordered to answer certain questions on August 14 and to appear in court for examination on August 31. The objectant not only failed to appear on either occasion, he also neglected to respond to the instant motion. The court recognized that if it merely precluded the objectant from adducing any evidence, the estate would be in a position to move for summary judgment. For, since the scope of disclosure encompassed his entire claim, the preclusion order would be equally broad in its sweep.⁵⁴ Moreover, the court was convinced that the claim was totally devoid of merit. Accordingly, the objections were dismissed with prejudice.

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5015(a)(1): Busy schedule does not constitute ground for "excusable default."

Under CPLR 5015 the court's "inherent discretionary power to vacate its own judgment for sufficient reason and in the interests of substantial justice"⁵⁵ is affirmed statutorily. CPLR 5015(a)(1) prescribes the manner in which a party may move for vacatur of a judgment or an order on the ground of "excusable default." Although courts have been generous in opening default judgments in the past,⁵⁶ a recent case, *Hoffman v. Biendo*,⁵⁷ illustrates that relief is not automatic. Specifically, "law office failure" will not be considered "excusable default" within the purview of this subsection.⁵⁸

In *Hoffman* counsel had assured the court that he would be ready to proceed to trial on a specific date after an adjournment had been granted because he was not prepared. Nevertheless, he failed to appear with defendant and efforts to page him proved futile. Defendant subsequently applied for an order vacating the resultant default judg-

⁵¹ See, e.g., *Laverne v. Incorporated Village of Laurel Hollow*, 18 N.Y.2d 635, 219 N.E.2d 294, 272 N.Y.S.2d 780 (1966).

⁵² 64 Misc. 2d 1016, 316 N.Y.S.2d 504 (Surr. Ct. N.Y. County 1970).

⁵³ 7B MCKINNEY'S CPLR 3126, commentary 7, at 646-48 (1970).

⁵⁴ See *id.*, commentary 8, at 649-50 (1970).

⁵⁵ THIRD REP. 204; see also 5 WK&M ¶5015.12.

⁵⁶ 5 WK&M ¶ 5015.04.

⁵⁷ 64 Misc. 2d 499, 314 N.Y.S.2d 759 (N.Y.C. Civ. Ct. N.Y. County 1970).

⁵⁸ Cf. *Beermon Corp. v. Yager*, 34 App. Div. 2d 589, 308 N.Y.S.2d 109 (3d Dep't 1970), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 162 (1970) (busy schedule does not constitute justifiable excuse for delay under CPLR 3216).